HIGH COURT OF UTTARANCHAL AT NAINITAL.

(Court's order whether the case is or not approved for reporting**)**
(Chapter VIII Rule 32 (2) (b**)**

Description of the Case.

IN THE HIGH COURT OF UTTARANCHAL
AT NAINITAL

Criminal Appeal No. 1135 of 2001
(Old No. 2760 of 1983)

Mahesh alias Pappu & Another
…….. Appellants

Versus

State …….. Respondent.

Approved for reporting.

_____

Not approved for reporting.

Date of Decision 22nd December, 2004.

Initial of Judge.

_____

_____

Court No.2
Reserved

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Criminal Appeal No.1135 of 2001
(Old No. 2760 of 1983).

(1) Mahesh alias Pappu S/o Durga Prasad
(since deceased),
(2) Dinesh S/o Durga Prasad,
Both residents of Rampura, P.S.Rudrapur,
District- Nainital
(Now District-Udham Singh Nagar).
..... Appellants

Versus

State ..... Respondent.

Mrs. Pushpa Joshi, learned cousel for the appellants.
Sri U.P.S.Negi, learned Addl. Advocate General assisted by Sri G.S.Sandhu, learned A.G.A. for the respondent.

Coram: Hon'ble P.C.Verma.
Hon'ble B.C.Kandpal,J.

(Delivered by Hon'ble B.C. Kandpal,J.)

This appeal is directed against the common judgment and order dated 10.11.1983 passed by Special Judge (Addl. Sessions Judge), Nainital in Sessions Trial No. 105 of 1981, State versus Mahesh alias Pappu and three others and in Sessions Trial No.25 of 1982, State versus Iqrar Ahmad and three others, by which accused/appellants Mahesh alias Pappu, Dinesh and Iqrar Ahmad were convicted and sentenced the appellant Mahesh alias Pappu for life imprisonment under Sec. 302 of the Indian Penal Code and rigorous imprisonment for six months under Sec. 148 I.P.C. and rigorous imprisonment for further six months under Sec. 323 read

with Sec. 149 I.P.C. Each of the appellants Dinesh and Iqrar Ahmad were sentenced for life imprisonment under Section 302 read with Sec. 149 I.P.C., rigorous imprisonment for six months under Sec. 323 read with Sec. 149 I.P.C. and rigorous imprisonment for further six months under Sec. 147 I.P.C.

2. It is worthwhile to mention here that accused /appellant Iqrar Ahmad filed separate criminal appeal against his conviction and sentence, which was numbered as 1134 of 2001 (Old No.2759/1983). During the pendency of the said appeal appellant Iqrar Ahmad has died and the said appeal stood abated on his behalf, vide the Court's order dated 09.10.2003.

It may also be mentionable that appellant No. 1 – Mahesh alias Pappu of the appeal in hand has also died during the pendency of appeal and the appeal was also dismissed as abated on his behalf, vide the Court's order dated 09.10.2003.

3. Brief facts of the prosecution case are that on 31.1.1981 at about 6:30 P.M. deceased Tejpal and his mother Smt.Kalawati are going to the house of Dalpat in Village-Rampura, P.S. Rudrapur. When they reached near the house of accused Mahesh alias Pappu on the road, all the eight accused surrounded them. Accused Mahesh alias Pappu was armed with a knife and the remaining accused had *lathi*s and *danda*s on them. They started beating Tejpal and Smt.Kalawati. Accused Dinesh, Furkan and Iqrar Ahmad caught hold of Tejpal and accused Mahesh alias Pappu inflicted a knife blow on his stomach with the result that Tejpal fell on the ground and became unconscious. At the time of the incident the informant Indrapal younger brother of the

deceased, his brother Prempal and witnesses Tika Ram, Chhota Lal and Kanta arrived on the spot. The accused then made good their escape and Tejpal was carried by these persons to the Police Station. Indrapal had written the written report (Ext.Ka-1) on the spot and lodged it at the Police Station at 8:30 P.M. The F.I.R. (Ext. Ka-14) was written by Head Constable Abdul Gani (P.W.11) who registered a case in the general diary the same day at 8:30 P.M., Both the injured were sent for medical examination to Rudrapur hospital. On 03.2.1981 an intimation regarding the death of Tejpal in Government hospital Haldwani was received at the Police Station and the case was concerted into one under Sec. 302 I.P.C. on the same day.

4. Dr. S.K.Mehrotra (P.W.14) medically examined Smt.Kalawati on 231.1.1981, at 9:45 P.M. at Jawahar Lal Nehru Hospital, Rudrapur. He found the following injuries on her person:-

(1) Lacerated wound 1 cm. X ½ cm. muscle deep, 1 cm. above left eyebrow.

(2) Abraded area 5 cm. X 1 cm. on neck and lower third of left forearm.

The doctor opined that both these injuries were simple in nature and had been caused by some blunt weapon such as *lathi*. He also prepared the injury report (Ext.Ka-23). The doctor referred injured Tejpal for treatment to Government Hospital, Haldwani. Dr. S.Tondon, Civil Hospital, Haldwani (P.W.7) medically examined the injured Tejpal Singh at 00.15 A.M. on 01.2.1981. He found the following injuries on his person

and also prepared the injury report of Tejpal Singh (Ext.Ka-3).

(1) Lacerated wounds 3 cm. X ½ cm. scalp deep on the front side of the head.

(2) Stab wound with clean cut margin 4.5 cm. X ½ cm. X abdominal cavity deep 1 cm. lateral to umbilicus and a piece of omentum was coming out of the wound.

5. Dr.Tandon (P.W.7) also recorded the dying declaration (Ext.Ka-4) of Tejpal Singh at 00.30 A.M. the same day. According to the Dr.Tandon, at the time of recording the dying declaration, the deponent Tejpal Singh was mentally fit and he had given the said statement voluntarily.

6. The injured Tejpal Singh expired in Civil Hospital, Haldwani and on 1.2.1981 at 2.30 p.m. Dr. S.C.Misra (P.W.8) conducted the post mortem on the dead body of deceased Tejpal Singh. According to him the deceased was aged about 22 years. Rigor mortis was present over both upper and lower limbs and post mortem staining was present over back. The eyes of the corpse were closed. He found the following ante mortem injuries on the person of the deceased:-

(1) Lacerated wound 3 cm. X ½ scalp deep on the front side of head.

(2) Stitched measuring about 10 cms. in length over middle of the abdomen slightly right to the umbilicus.

According to Dr.Misra (P.W.8), the death of the deceased had been caused due to shock and haemorrhage as a result of the ante mortem injuries. He

has stated that injury No.2 was sufficient by itself to cause the death of the deceased. He prepared the post mortem report (Ext.Ka-5).

7. on 31.1.1981, at 9.30 P.M. Sri Bhuiya Deen, the then Special Nazul Adhikari, Rudrapur (P.W.1) recorded the dying declaration of injured Tejpal Singh in Rudrapur hospital which is Ext.Ka-12 on record.

8. Sub Inspector D.S.Bisht prepared the inquest report (Ext.Ka-6) on 1.2.1981 at 11.40 A.M. and other connected papers.

9. Thereafter the investigation of the case was taken up by S.I. Shradha Nand of P.S. Rudrapur (P.W.13). He recorded the statements of the witnesses and accompanied with Sri Bhuiya Deen (P.W.1) he went to record the dying declaration of Tejpal Singh and arrested accused Dinesh Kumar and Durjan Lal. On 1.2.1981 he arrested accused Furkhan. He also inspected the place of occurrence on 1.2.1981 and prepared the site plan Ext.Ka-19. He then arrested accused Mahesh alias Pappu. After completing the investigation, charge-sheets Exts.Ka-21 and Ka-22 were submitted against the accused persons by the subsequent Investigating Officer S.I.Krishna Kumar Singh on 20.2.1981.

10. After the charge sheet were submitted the accused/appellants were committed to the Court of Sessions and the learned Addl. Sessions Judge, Nainital on 15.10.1981 framed charge under Sections 148, 302 and 307 read with Sec. 149 I.P.C. against the accused Mahesh alias Pappu and under Sections 307 r/w Sec. 149, 302 r/w Sec. 149 and 147 I.P.C. against the

accused Dinesh, Furkhan and Durjan Lal in Sessions Trial No.105 of 1981 to which they pleaded not guilty.

11. On the same day i.e. 15.10.1981 charge under Secs. 147, 307 read with Sec. 149 and 302 r/w Sec. 149 I.P.C. was framed against the accused Iqrar Ahmad, Satish Chandra, Smt.Phula Devi and Makhan Lal in Sessions Trial No. 25 of 1982 to which they pleaded not guilty and claimed their trial.

12. The prosecution in support of its case against the accused produced P.W.1 informant Sri Indrapal, P.W.2 Smt.Kalawati-injured, P.W.3 Sri Kanta, P.W.4 Sri Tika Ram, both are the eye witnesses of the occurrence, P.W.5 Head Constable Nauni Ram, P.W.6 Constable Gopal Singh, P.W.7 Dr.S.Tandon, P.W.8 Dr. S.C.Misra, P.W.9 Sub Inspector D.S.Bisht, P.W.10 Sri Bhuiya Deen, P.W.11 Head Constable Abdul Gani, P.W.12 Head Constable Sheilak Chand, P.W.13 Sub Inspector Shradha Nand, Investigating Officer and P.W.14 Dr.S.K.Mehrotra. Out of these 14 witnesses, P.Ws. 5 to 14 are formal witnesses.

13. After the evidence of the prosecution was over, the statements of the accused persons were recorded under Section 313 of the Criminal Procedure Code.

In their statements accused Mahesh alias Pappu and Dinesh stated that they were implicated falsely on account of their enmity with police constable Ram Bharose. The accused/appellants did not adduce any evidence in their defence.

14. The learned trial court after having perused the evidence on record and hearing the learned counsel for the parties convicted and sentenced the accused/appellants Mahesh alias Pappu, Dinesh and Iqrar Ahmad as above. Feeling aggrieved by the aforesaid impugned judgment and order dated 10.11.1983, the appellants Mahesh alias Pappu and Dinesh have come up in appeal.

15. As we have mentioned earlier that accused/appellant Mahesh alias Pappu has died and the appeal against him has already been abated vide Court's order dated 09.10.2003. Hence we have heard the learned counsel on behalf of appellant No.2-Dinesh as well as learned Addl. Advocate General for the State and perused the record.

16. It has been argued first of all on behalf of the appellants that there in an inordinate delay in lodging the F.I.R. which reveals that the same has been lodged after much consultation and deliberation with a result that there had been a false implication of the accused/appellants in the present crime. It has further been submitted that in fact Tejpal Singh deceased was assaulted by some known assailants during the dark hour of the night but at the instance of constable Ram Bharose who was enimical with the accused Mahesh alias Pappu since deceased, the appellants have been falsely implicated in the present crime.

17. The submission advanced by the learned counsel for the appellants is devoid of any force as the record shows that the incident is said to have taken place at

6:30 p.m. on 31.01.1981. P.W. 1 Indrapal who is the complainant of the present case had deposed that he had written the report Ex. Ka. 1 at the place of occurrence. He thereafter called rickshaw who took some time and after all this, he carried the injured Tejpal to the hospital. This witness has further deposed that it took about 10 minutes to cover the distance from the place of occurrence to the police station and thereafter the F.I.R. could be lodged at 8:30 p.m. The explanation given by the informant in his deposition before the Court, thus does not indicate that the same has been lodged after much delay. The informant has given the time of incident on the basis of his own estimate and there is every likelihood of some difference in his statement, which is natural.

18. Learned counsel for the appellants has also submitted that in view of the evidence adduced by the prosecution it becomes quiet clear that other accused have falsely been implicated and on this basis the entire case against the accused/appellants would thus come with the ambit of doubt.

19. We again do not find any force in this argument. It is commonly seen the there is a tendency on the part of the witnesses to depose in an exaggerated form and rope the innocent persons alongwith the actual culprit. But the Court has to discharge the onerous duty of separating the grain from the chaff and only on this count that some other accused have been falsely implicated in the case, the entire case and the role attributed to the accused/appellants in the instant case would not become false.

20. Learned counsel for the appellants has further tried to assail the prosecution case by making the submission that the prosecution has not alleged any motive with the accused/appellants as to why they would cause the death to Tejpal Singh. Hence, it does not appeal to the reason as to why the accused/appellants would commit a gruesome murder without any ryme of reason.

21. The submission of the learned counsel does not make the prosecution case unreliable. The established principle of law is that when there is direct evidence available pertaining to the commission of crime of offence, the motive losses its importance. In the instant case, we find direct evidence in order to establish the charge leveled against the accused/appellants Mahesh alias Pappu, Dinesh and Iqrar. Thus the question that the prosecution did not allege any motive for the commission of the offence of murder, does not adversely affect the prosecution case against the accused/appellants unless it is shown that the evidence against the accused/appellants is wholly unreliable or doubtful.

22. Now we shall discuss the ocular version produced by the prosecution in order to establish the guilt of the accused/appellants. The evidence on record shows that the accused/appellants Mahesh alias Pappu caused a stab wound on the stomach of the deceased Tejpal Singh while accused Dinesh and Iqrar had assaulted with lathis and caused the injury on the person of deceased Tejpal Singh as well as his mother Smt. Kalawati who was accompanying him at the time of incident. The role

attributed to accused/appellants Dinesh and Iqrar is that of catching hold the deceased Tejpal Singh also. In order to establish the guilt of the accused/appellants, the prosecution has produced the informant Indrapal P.W.1, injured witness Smt. Kalawati P.W.2 as well as other witnesses namely, Kanta P.W.3 and Tika Ram P.W.4.

23. P.W. 1 Indrapal is the informant and as per his deposition, he has seen the occurrence from a distance of 20 paces. In case, if the deposition of this witness is assessed and scrutinized deeply, then it reveal that when he reached the spot, he saw the assailants were running away. This witness reached at the spot alongwith P.W. 3 Kanta and P.W.4 Tika Ram.

24. As far as the deposition of P.W. 3 Kanta is concerned, it appears from his evidence that he is not supporting the prosecution case and turned hostile. Likewise, P.W. 4 Tika Ram has also stated that when he reached the spot of occurrence, the assailants were running in all directions and Tejpal Singh were lying injured on the ground. He has further deposed that Tejpal Singh injured was surrounded by 15-20 persons and was groaning. These persons were enquiring from Tejpal, the name of the assailants and thus he came to know their names. The deposition of this witness clearly shows that he had no occasion to see the actual incident himself and could not recognize any of the accused. Therefore, the deposition of P.W. 3 Kanta and P.W. 4 Tika Ram is of no evidentiary value and the prosecution is not going to establish anything on the basis of the deposition of the aforesaid two witnesses. The position of the complainant P.W. 1 is also somewhat similar to that

of P.W. 3 and P.W. 4 as we have already observed that he also reached the spot with the aforesaid two witnesses. The statements of the aforesaid three alleged witnesses i.e. P.W. 1 Indrapal, P.W.3 Kanta and P.W. 4 Tika Ram do not appear to be much clinching and their deposition is not going to establish the complicity of the accused/appellant.

25. Now the solitary testimony of Smt. Kalawati against the accused/appellants, is on the record and it reveals that she is an injured witness and her presence on the place of occurrence could not be doubted.

26. Much emphasis has been put on this aspect that this witness being injured witness but she is related closely with the deceased. Hence being a partisan, her testimony cannot be accepted without any corroboration.

27. It is true that P.W. 2 Smt. Kalawati is the mother of deceased Tejpal Singh. She has sustained two injuries during the course of occurrence which cannot be disputed. Therefore, in view of the injuries on person to Kalawati, her presence at the place of occurrence as well as at the alleged time cannot be doubted in any manner. P.W. 2 Smt. Kalawati in her statement has stated that "मुझे 2 – 4 डंडे पड़े। तेजपाल को भी 2 – 4 लाठी पड़ी चाकू लगने पर वह गिर गया। लाठी लगने पर नहीं गिरा था।" In the aforesaid statement, if the injury report of Smt. Kalawati is perused then it reveals that she was medically examined immediately after the occurrence on 31.01.1981 at 9:45 p.m. at the Govt. Hospital at Rudrapur and the Doctor found one lacerated wound 1 cm. x ½ cm. muscle deep, 1 cm. above left eyebrow and abraded area 5 cm. x 1 cm. on neck and

lower third of left forearm. The Doctor opined that these injuries could have been caused by some blunt object such at lathi and were fresh in duration. Keeping in view the injuries sustained by Smt. Kalawati on her vital part, it cannot be presumed in any manner that the injury might be self inflicted by Smt. Kalawati only in order to falsely implicated the accused/appellants in this crime. Therefore, the presence of the injured witness at the place of the occurrence cannot be doubted and we find that the injuries on the person Smt. Kalawati finds complete corroboration with her deposition before the Court.

28. Smt. Kalawati has further given a detailed explanation in her deposition with regard to the manner of incident. She has stated that when the accused/appellants saw her and her son Tejpal then they firstly started beating her and her son with lathies and when her son wanted to run away from the spot then Dinesh and Iqrar caught hold of him and Mahesh alias Pappu assaulted on the abdomen of Tejpal with knife due to which he fell down on the earth. The Doctor who has examined Tejpal Singh found one lacerated wounds 3 cm. x ½ cm. sclap deep on the front site of the head and the Doctor opined that this injury could have been caused by blunt object. Therefore, keeping in view the deposition of P.W. 2 Kalawati, it can safely be concluded that she has given a true picture with regard to the manner of incident as has been alleged by the prosecution.

29. The evidence of Smt. Kalawati further finds corroboration with the dying declaration of Tejpal Singh.

30. Learned counsel for the appellants has submitted that there are two dying declaration of Tejpal Singh available on record and in the two dying declarations, different versions are there. Therefore, the dying declaration appear to be tainted and tutored and hence no reliance can be attached to these dying declarations. It has also been submitted that the role attributed to the accused/appellants come within the ambit of doubt in view of these two dying declarations.

31. In order to access the argument advance by the learned counsel for the appellants, we will have to again scrutinize the dying declaration recorded by the Magistrate as well as by the Doctor who attended Tej Pal while he was injured at Haldwani. The prosecution has produced P.W. 10 Sri Bhuiya Deen a Magistrate who recorded the dying declaration of Tejpal Singh on 31.01.1981 at 9:05 p.m. at Govt. Hospital Rudrapur. P.W. 10 Sri Bhuiya Deen has deposed in his statement that he recorded the statement of Tejpal Singh after having been satisfied with regard to the condition as well as mental status. This witness has stated that the S.I. came to him at about 9:00 p.m., he reached at hospital within five minutes and started recording the statement of the injured Tejpal Singh. This witness has stated that he could conclude the dying declaration by 9:30 p.m. as Tejpal was groaning with pain at that time and could speak hardly. This witness has further stated that he also made himself satisfied with the condition of the injured by the opinion of the Doctor before recording the dying declaration of the deceased. We do not find any reason to disbelieve the statement of P.W. 10 Sri

Bhuiya Deen who is a Magistrate and an independent witness as he has no reason to be partisan with any of the parties. The F.I.R. could be lodged at 8:30 p.m. at police station and after the case was registered certainly the Investigating Officer must have approached the Magistrate by 9:00 p.m. and thereafter immediately the Magistrate reached in the hospital within a period of 5 minutes and started recording the statement of the deceased. We do not find any reason which may suggest that the dying declaration by the Magistrate is tutored or tainted.

32. Learned counsel for the appellants has submitted that there was no reason to record the dying declaration by Doctor in case if the previous dying declaration which has been alleged to have been recorded at 9:05 p.m. by the Magistrate was already there.

33. We are not satisfied with this argument. In case, if two dying declarations are there even than the prosecution case does not become doubtful unless it is shown that the dying declarations are tainted.

34. Perusal of both the dying declarations show that it was accused/appellants Mahesh who assaulted Tejpal with knife while Dinesh and Iqrar also assaulted with lathies and when the injured tried to run away from the place of occurrence then Mahesh alias Pappu assaulted with knife. If we peruse first dying declaration recorded by the Magistrate on 31.01.1981 at 9:30 p.m. then it reveals that deceased has stated therein that Dinesh and Iqrar as well as other persons caught hold of him and then Mahesh alias Pappu gave a knife blow on his

abdomen. The deceased in the end of his dying declaration has stated that firstly, the accused/appellants assaulted with lathies and when he wanted to run away then Mahesh alias Pappu assaulted with knife.

35. Now if we peruse the second dying declaration which is alleged to have been recorded by Doctor on 01.02.1981 at 00:30 a.m. at Govt. Hospital Haldwani then it reveals that the deceased has stated therein that Dinesh and Iqrar assaulted him with lathies and Mahesh alias Pappu assaulted with knife. The deceased has also stated therein "इन लोंगों ने धेर कर मुझे मारा"।

36. Therefore, if we analyse both the dying declarations then one thing becomes clear and that is the role attributed to the accused/appellants in both the dying declarations is similar. The statement of the deceased makes it clear that he attributed the role to accused Dinesh and Iqrar of causing lathies blow on his person and accused Mahesh alias Pappu causing knife blow on his abdomen. Under these circumstances, the presence of accused/appellant Dinesh as the spot having common intention of committing the murder of deceased Tejpal Singh cannot be disbelieved. The dying declaration, therefore, supports the ocular version of Smt. Kalawati who has been produced by the prosecution as P.W.2 and who has also sustained injuries during the course of the occurrence.

37. Learned counsel for the accused/appellants has cited before us a decision recorded in JCT 2004 92) (SC) 13 Lella Srinivasa Rao Vs. State of Andhra Pardesh and

on the basis of this decision it has been submitted that *when there are two dying declarations being inconsistent then it is not safe to rely upon and convict the accused.*

38. We have gone through the decision cited before us and we are of the view that the decision is not applicable to the facts and circumstances of the present case. In the cited case, the Hon'ble Apex Court has clearly held that there was no other evidence except the two inconsistent dying declarations to prove the prosecution allegation and hence the Hon'ble Apex Court did not find it safe to act solely on those dying declarations to convict the accused/appellants. In the instant case the position is not like that. We have already discussed the two dying declarations firstly it cannot be said to be inconsistent as specific role has been attributed by the deceased to the accused/appellants. Moreover, these two dying declarations are in absolute corroboration with the ocular version of P.W. 2 Smt. Kalawati who is an eyewitness as well as sustained injuries during the course of the occurrence. Further, the ocular version of Smt. Kalawati finds full support with the medical version adduced by the prosecution.

39. On consideration of the entire evidence on record and the circumstances as well as the probabilities of the case, we find that the prosecution has successfully established the guilt of the accused/appellant beyond reasonable doubt.

40. We do not find any ground for disturbing the impugned judgment and order dated 10.11.1983 passed

by the Court below convicting the appellants and sentencing thereon.

41. In our opinion, the appeal is liable to be dismissed and the impugned judgment and order dated 10.11.1983 passed by the Court below pertaining to the conviction and sentence of the accused/appellants deserves to be confirmed.

42. The appeal thus fails and is accordingly dismissed.

(B.C. Kandpal, J) **(P.C. Verma, J.)**

December 22, 2004
Shiv